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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

LISA LIBERI and PHILIP J. BERG,	)	Case No. 8:11-CV-00485-AG (AJW)
ESQUIRE and THE LAW OFFICES OF	)	Hon. Andrew Guilford
PHILIP J. BERG and EVELYN ADAMS	)	Courtroom 10D
a/k/a MOMMA E and LISA M.)	
OSTELLA and GO EXCEL GLOBAL,	)	<u>OBJECTIONS TO AND</u>
	)	<u>MEMORANDUM OF POINTS AND</u>
Plaintiffs,	)	<u>AUTHORITIES BY DEFENDANT,</u>
	)	<u>YOSEF TAITZ, IN <i>REPLY</i> TO</u>
vs.	)	<u>LATE-FILED OPPOSITION TO HIS</u>
	)	<u>MOTION TO STRIKE PORTIONS</u>
ORLY TAITZ, a/k/a DR. ORLY TAITZ,	)	<u>OF PLAINTIFFS' FIRST AMENDED</u>
a/k/a LAW OFFICES OF ORLY TAITZ;	)	<u>COMPLAINT PURSUANT TO FRCP</u>
a/k/a WWW.ONLYTAITZESQ.COM	)	<u>RULE 12(f); SUPPORTING</u>
a/k/a WWW.REPUBX.COM a/k/a	)	<u>DECLARATION</u>
ORLY TAITZ, INC. and DEFEND OUR)	
FREEDOMS FOUNDATIONS, INC.	)	Date: August 29, 2011
and YOSEF TAITZ and THE SANKEY	)	Time: 10:00 a.m.
FIRM and SANKEY INVESTIGA-	)	Place: Courtroom 10D
TIONS, INC. and NEIL SANKEY and)	
JAMES SUNQUIST and ROCK SALT	)	Date Action Filed: May 4, 2009
PUBLISHING and LINDA SUE	)	Discovery Cut-Off: March 5, 2012
BELCHER a/k/a LINDA S. BELCHER	)	Final Pre-Trial Conf.: May 21, 2012
a/k/a LINDA STARR; a/k/a	)	Trial Date: June 5, 2012
NEWWOMENSPARTY a/k/a)	
STITCHENWITCH a/k/a EVA BRAUN)	
a/k/a WEB SERGEANT a/k/a KATY)	
a/k/a WWW.OBAMACITIZENSHIP)	
DEBATE.ORG and EDGAR HALE)	
a/k/a JD SMITH; and CAREN HALE;)	
and PLAINS RADIO NETWORK, a/k/a)	
PLAINS RADIO NETWORK, INC.)	
a/k/a PLAINS RADIO; and BAR H)	
FARMS; and KPRN AM 1610; and)	
DOES 1 through 200 Inclusive,)	
Defendants.)	

1 **TO THE COURT, ALL PARTIES, AND/OR THEIR ATTORNEYS OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that Defendant, YOSEF TAITZ (“Moving
4 Defendant”), submits the following objections and reply to the late-filed Opposition
5 by Plaintiffs, LISA LIBERI, LISA M. OSTELLA , PHILIP J. BERG, ESQUIRE,
6 THE LAW OFFICES OF PHILIP J. BERG, and GO EXCEL GLOBAL
7 (collectively “Plaintiffs”), to Moving Defendant’s Motion to Strike pursuant to
8 Federal Rules of Civil Procedure (“FRCP”) Rule 12(f) portions of Plaintiffs’ First
9 Amended Complaint (“FAC”).

10 **I. OBJECTIONS TO LATE-FILED OPPOSITION**

11 As set forth in the attached declaration, Plaintiffs filed and served their
12 Opposition (consisting of twenty-three pages) at 6:05 *p.m. (PDT) on Saturday,*
13 *August 13, 2011.* Thus, the Opposition was filed and served five days too late.
14 (Local Rule 7-9.)

15 Moving Defendant’s counsel preparing this Reply first saw the Opposition on
16 the morning of Monday, August 15, 2011 - the same day that such Reply is due to
17 be filed and served. (Local Rule 7-10.) In addition to Plaintiffs’ blatant violation of
18 the requirements for service and filing of their Opposition, Moving Defendant and
19 his counsel cannot be expected to prepare a Reply to such Opposition in less than
20 one business day. Plaintiffs’ untimely Opposition is typical of their bad-faith
21 litigation tactics employed in this matter, designed to prejudice Moving Defendant
22 and prevent him from preparing a sufficient Reply.

23 For these reasons, Moving Defendant urges this Court to reject and not
24 consider Plaintiffs’ Opposition to his Motion to strike.

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1 **II. LEGAL ARGUMENT AND AUTHORITY**

2 **A. *Plaintiffs Cannot Seek Three Billion Dollars in Civil Penalties Under***
3 ***Cal. Civil Code § 1798.84 Pursuant to a Claim for Relief For***
4 ***Violation of Cal. Civil Code § 1798.85***

5 i. **Plaintiffs' Sixth Claim for Relief Under Cal. Civil Code §**
6 **1798.85 Does Not Provide For or Allow Penalties Under Cal.**
7 **Civil Code §§ 1798.84**

8 Plaintiffs' seek remedies in their Sixth Claim for Relief pursuant to Cal. Civ.
9 Code § 1798.85 (FAC, pp. 97-102). Plaintiffs assert that Moving Defendant, an
10 individual, may be subject to a \$3,000 fine per alleged violation of such statute per
11 Cal. Civ. Code § 1798.84. (FAC ¶ 261.) Plaintiffs contend that they are entitled to a
12 penalty under Civ. Code § 1798.84 against Moving Defendant of \$3,000,000,000.
13 (FAC ¶ 262.)

14 Plaintiffs' claim for such remedies is, as a matter of law, incorrect. Section
15 1798.84 specifically only applies to violations of Cal. Civ. Code § 1798.83 as
16 follows:

17 In addition, for a willful, intentional, or reckless violation
18 of Section 1798.83, a customer may recover a civil penalty
19 not to exceed three thousand dollars (\$3,000) per violation;
20 otherwise, the customer may recover a civil penalty of up
to five hundred dollars (\$500) per violation for a violation
of Section 1798.83. (Emphasis added.)

21 Plaintiffs' Sixth Claim for Relief ("Violation of Cal. IPA, *Cal. Civ. Code* §
22 1798.85") is explicitly based on alleged violation of Section 1798.85, not 1798.83.
23 (FAC, pp. 97-102.) Because the penalty sought by Plaintiffs under Civ. Code §
24 1798.84 is only available pursuant to a claim under Civ. Code § 1798.83, but
25 Plaintiffs do not assert any claim pursuant to Civ. Code § 1798.83, the portions of
26 their FAC (¶¶ 261-263) in which Plaintiffs seek such penalty should, as a matter of
27 law, be stricken. FRCP Rule 12(f).

28 Plaintiffs in their late-filed Opposition do not address their improper claim

1 for penalties pursuant to Civ. Code § 1798.84. Thus, by their silence, Plaintiffs
2 admit that such claim should be stricken.

3 ii. **Plaintiffs Have Not Stated, and Cannot State, a Claim Under**
4 **Cal. Civil Code § 1798.83 Against Moving Defendant**

5 Cal. Civ. Code § 1798.83 applies only to the actions of a “business” entity
6 that collects data from its “customers.” Section 1798.83 is entitled “Disclosure to
7 customer on request of personal information provided to third parties for direct
8 marketing purposes; Format; Privacy policy.” Plaintiffs do not plead any claim
9 under Section 1798.83. They do not plead that they are or were “customers” of any
10 Defendant (including Moving Defendant), any “request [for] personal information”
11 by any “third parties,” nor any “direct marketing” activities.

12 Civ. Code § 1798.83(e)(2) provides: “‘Direct marketing purposes’ means the
13 use of personal information to solicit or induce a purchase, rental, lease, or
14 exchange of products, goods, property, or services directly to individuals by means
15 of the mail, telephone, or electronic mail for their personal, family, or household
16 purposes.” Plaintiffs do not plead any such “direct marketing purposes.”

17 Civ. Code § 1798.83 applies to a “business” with an “established business
18 relationship with a customer.” [Section 1798.83(a).] Moving Defendant is not a
19 business entity, but an individual; Plaintiffs do not plead that Moving Defendant
20 had an “established business relationship” with them. Therefore, Plaintiffs cannot
21 state (and have not stated) any claim against him under Civ. Code § 1798.83.

22 Further, neither Plaintiffs LIBERI nor OSTELLA (the Plaintiffs asserting the
23 Sixth Claim for Relief) are “customers” of any required “business.” Civ. Code §
24 1798.83(e)(1) provides: “‘Customer’ means an individual who is a resident of
25 California who provides personal information to a business during the creation of,
26 or throughout the duration of, an established business relationship if the business
27 relationship is primarily for personal, family, or household purposes.” (Emphasis
28 added.)

Neither Plaintiffs LIBERI nor OSTELLA are “customers” as defined in Civ. Code § 1798.83(e)(1). They plead that LIBERI is a resident of *New Mexico* (FAC, ¶ 4) and that OSTELLA is a resident of *New Jersey* (FAC, ¶ 8). (Plaintiffs cannot plead this requirement of Civ. Code § 1798.83 where to do so would destroy diversity jurisdiction.) They do not plead that they provided “personal information” to any Defendant, including Moving Defendant. They do not plead the required “established business relationship.”

Plaintiffs do not request leave to bring any claim for relief against Moving Defendant pursuant to Civ. Code § 1798.83. Even if Plaintiffs had requested such leave, it would be futile where they cannot, as a matter of law, assert a claim against Moving Defendant pursuant to Civ. Code § 1798.83.

B. *Plaintiffs Cannot Seek Attorney Fees Under Cal. Civil Code §§ 1798.83(g) or 1798.84(g) Against Moving Defendant, Yosef Taitz*

i. Plaintiffs Admit They Have No Claim Under Cal. Civil Code §§ 1798.83(g)

Plaintiffs seek attorneys fees under Cal. Civ. Code § 1798.83(g). (FAC, p. 170). Section 1798.83(g) does not provide for attorneys fees. It states: “The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.” As such, Civ. Code § 1798.83(g) is an improper statute upon which to base a claim for attorneys fees. Plaintiffs’ requests for attorney fees under Civ. Code § 1798.83(g) should therefore be stricken.

Plaintiffs in their late-filed Opposition (pg. 6) admit that they cannot seek attorney fees pursuant to Civ. Code § 1798.83(g). Instead, they now assert that the reference to Civ. Code § 1798.83(g) was a typographical error and should be “*Cal. Civ. Code* § 1798.84(g).” (Oppo., 6: 22-23.)

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ii. **Plaintiffs Have Not Stated, and Cannot State, a Claim Under Cal. Civil Code § 1798.84(g) Against Moving Defendant**

Cal. Civ. Code § 1798.84(g) provides: “A prevailing plaintiff in any action commenced under Section 1798.83 shall also be entitled to recover his or her reasonable attorney's fees and costs.” In order to seek a remedy under Section 1798.84, Plaintiffs must first have a claim for relief under Section 1798.83.

Plaintiffs are not entitled to seek attorney fees against Moving Defendant under Civ. Code § 1798.84(g) for several reasons, including but not limited to that they do not allege any claim under Civ. Code § 1798.83 against him. Plaintiffs' Sixth Claim for Relief (“Violation of Cal. IPA, *Cal. Civ. Code* § 1798.85”), in which Plaintiffs seek the subject penalty, is explicitly based on alleged violation of Section 1798.85, not 1798.83. (FAC, pp. 97-102.)

Plaintiffs do not request leave to bring any claim against Moving Defendant pursuant to Civ. Code § 1798.84. Even if Plaintiffs had requested such leave, it would be futile where they cannot, as a matter of law, assert a claim against Moving Defendant pursuant to Civ. Code § 1798.83.

Where Plaintiffs have not stated, and cannot state, a claim against Moving Defendant pursuant to Civ. Code § 1798.83, their request for leave to assert a claim for attorney fees under Civ. Code § 1798.84(g) should be denied.

C. ***Plaintiffs Cannot Seek Attorney Fees Under Cal. Civil Code §§ 1798.50 or “1786.50(2)” Against Moving Defendant, Yosef Taitz***

i. **Plaintiffs Admit They Cannot Seek Attorney Fees Under Cal. Civil Code §§ 1798.50**

Plaintiffs may not recover attorney fees under Cal. Civ. Code § 1798.50 (FAC, p. 170). Civ. Code § 1798.50 states: “A civil action shall not lie under this article based upon an allegation that an opinion which is subjective in nature, as distinguished from a factual assertion, about an individual's qualifications, in connection with a personnel action concerning such an individual, was not accurate,

1 relevant, timely, or complete.” This Section does not provide, nor even mention, an
2 award of attorneys fees. As such, Plaintiffs’ requests for attorneys fees under Civ.
3 Code § 1798.50 should be stricken.

4 Plaintiffs admit they cannot seek attorney fees under Civ. Code § 1798.50
5 (Oppo., 6: 24-27.)

6 ii. **Plaintiffs Have Not Stated, and Cannot State, a Claim Under**
7 **Cal. Civil Code §§ “1786.50(2)” or 1786.50(a)(2) Against**
8 **Moving Defendant**

9 Plaintiffs request leave to seek attorney fees against Moving Defendant under
10 “*Cal. Civ. Code* § 1786.50(2).” (Oppo., 6: 26-27.) There is no “*Cal. Civ. Code* §
11 1786.50(2).” Assuming that Plaintiffs are referring to Cal. Civ. Code §
12 1786.50(a)(2), they still may not assert any claim under this Section against Moving
13 Defendant.

14 Civ. Code § 1786.50 is part of Title 1.6 of California’s Civil Code. Such Title
15 is referred to as the “Investigative Consumer Reporting Agencies Act.” (Civ. Code §
16 1786.1.) As demonstrated in Moving Defendant’s Motion to dismiss, Plaintiffs have
17 no claim against him under the Investigative Consumer Reporting Agencies Act.

18 For example, Civ. Code § 1786.2(b) provides that "consumer" means a
19 “natural individual who has made application to a person for employment purposes,
20 for insurance for personal, family, or household purposes, or the hiring of a
21 dwelling unit, as defined in subdivision (c) of Section 1940.” No Plaintiff (including
22 LIBERI or OSTELLA) has alleged that he or she is a “consumer” under this Act.

23 Civ. Code § 1786.2(c) provides in relevant part that "investigative consumer
24 report" means “a consumer report in which information on a consumer's character,
25 general reputation, personal characteristics, or mode of living is obtained through
26 any means.” No Plaintiff (including LIBERI or OSTELLA) has alleged the
27 existence of any required “investigative consumer report” under this Act.

1 Civ. Code § 1786.2(d) defines "investigative consumer reporting agency" to
2 mean:

3 [A]ny person who, for monetary fees or dues, engages in
4 whole or in part in the practice of collecting, assembling,
5 evaluating, compiling, reporting, transmitting, transferring,
6 or communicating information concerning consumers for
7 the purposes of furnishing investigative consumer reports
8 to third parties, but does not include any governmental
9 agency whose records are maintained primarily for traffic
10 safety, law enforcement, or licensing purposes, or any
11 licensed insurance agent, insurance broker, or solicitor,
12 insurer, or life insurance agent.

13 No Plaintiff (including LIBERI or OSTELLA) has alleged that Moving
14 Defendant is an "investigative consumer reporting agency" as defined under this
15 Act.

16 As a matter of law, where Plaintiffs have no claim against Moving Defendant
17 under the Investigative Consumer Reporting Agencies Act, they cannot seek any
18 remedy (including for attorney fees under Civ. Code § 1786.50(a)(2)) under such
19 Act against him.

20 **D. *Plaintiffs Have Not Pled Legally Sufficient Claims for Punitive***
21 ***Damages, Governed by Cal. Civil Code § 3294, as Against Moving***
22 ***Defendant, Yosef Taitz***

23 California law governs Plaintiffs' claims for punitive damages under Cal.
24 Civ. Code §§ 3294 and 3295. Bureerong v. Uvawas, 922 F.Supp. 1450, 1480
25 (C.D.Cal.1996). Plaintiffs plead that their claims for punitive damages are based on
26 Cal. Civ. Code § 3294. (See, FAC, ¶ 199.)

27 A key concept that Plaintiffs apparently do not understand is that punitive
28 damages (under Civ. Code § 3294) provide a *remedy* and do not constitute a
separate cause of action; a claim for punitive damages must be based on a legally-
sufficient, separate claim for relief. Where a plaintiff's claim for punitive damages
is based on an insufficient underlying claim for relief, the claim for punitive
damages must also fail. Brown v. Adidas Int., 938 F.Supp. 628, 635 (1996, SD Cal).

1 Von Grabe v. Sprint PCS, 312 F.Supp.2d 1285, 1308-1309 (S.D. Cal. 2003).

2 As shown in Moving Defendant's Motion to Dismiss, Plaintiffs fail to state
3 facts constituting any legally-sufficient claim for relief against him. Accordingly,
4 where punitive damages provide a *remedy* and must be based on a legally-sufficient
5 claim for relief, and Plaintiffs do not plead any sufficient claim for relief against
6 Moving Defendant, all of Plaintiffs' claims for punitive damages should be stricken.
7 Civ. Code § 3294. Brown, *supra*, 938 F.Supp. at p. 635. Von Grabe, *supra*, 312
8 F.Supp.2d at pp. 1308-1309.

9 Plaintiffs' only attempt to address this issue provides: "Plaintiffs have pled
10 facts which support a claim for oppression, fraud or malice in order to recover
11 punitive damages, as required. Decker v. Glenfed, Inc., 42 F.3d 1541, 1547 (9th Cir.
12 1994). Thus, Defendant Yosef Taitz's Motion must be denied." (Oppo., ¶ 32.)

13 To the contrary, Plaintiffs have utterly failed to plead facts establishing any
14 claim, much less meet the pleading requirements for a claim for punitive damages,
15 as against Moving Defendant. Further, Plaintiffs' reliance on Decker is improper
16 where it has been *superseded by statute*. (See, In re Remec Inc. Sec. Litig., 702 F.
17 Supp. 2d 1202 (S.D. Cal. 2010).) Decker also did not involve a claim for punitive
18 damages under California law. Instead, it involved claims for securities fraud under
19 § 10(b) of the Securities Exchange Act of 1934.

20 The specific issue in Decker concerned whether plaintiffs had sufficiently
21 alleged "scienter" necessary for a fraud claim. The Court of Appeals cited to the rule
22 requiring "particularized allegations of the circumstances constituting fraud."
23 Decker v. Glenfed, *supra*, 42 F.3d at p. 1547. The Court also held that "mere
24 conclusory allegations of fraud are insufficient." (Id. at p. 1548.)

25 If and to the extent Decker may be relied on herein, it would require the
26 striking of Plaintiffs' claims for punitive damages against Moving Defendant.
27 Instead of containing "particularized allegations of the circumstances" supporting
28 punitive damages, Plaintiffs' FAC falls far short of this requirement and does not

1 even rise to the level of conclusory allegations against Moving Defendant. The bulk
2 of the FAC is simply incomprehensible gibberish from which no legally cognizable
3 claim can be discerned.

4 In their late-filed Opposition, Plaintiffs simply ignore the fact that they
5 purport to seek punitive damages on claims for relief based in negligence or other
6 unintentional conduct, such as Plaintiffs' Nineteenth Cause of Action for "Negligent
7 Infliction of Emotional and Mental Distress" and Twentieth Cause of Action for
8 "Res Ipsa Loquitor Negligence." As a matter of law, a claim for punitive damages
9 cannot be based on negligent or otherwise unintentional conduct. Civ. Code §
10 3294(a). Mere negligence, even gross negligence, is not sufficient to justify an
11 award of punitive damages. Ebaugh v. Rabkin (1972) 22 Cal. App.3d 891.

12 Plaintiffs "sidestep" this defect in their FAC by contending that "Yosef
13 Taitz's actions were not an accident or based on negligence, they were intentional,
14 willful and wanton." (Oppo., 8: 20-21.) This argument misses the point: Plaintiffs'
15 claims for punitive damages based on their Nineteenth and Twentieth Causes of
16 Action based in negligence cannot, as a matter of law, stand. Such claims should
17 therefore be stricken. FRCP Rule 12(f).

18 **E. *Plaintiffs' Publication of Moving Defendant's Personal Residence***
19 ***Address is Impertinent and Immaterial, and Should Be Stricken from***
20 ***the FAC***

21 PLAINTIFFS in the FAC (¶¶ 9, 10 and 27) identify the residential address of
22 Moving Defendant. While identifying the State and County of a Defendant may be
23 required in order to establish jurisdiction and venue, additional identification
24 including Moving Defendant's street, number, and zip code are simply unnecessary.
25 As such, this information should be stricken in all places it appears in the FAC.

26 Plaintiffs' only comment on this issue is "Defendant Yosef Taitz's address is
27 material to the within litigation." (Oppo., 4: 14.) Plaintiffs fail to attempt to show
28 how Moving Defendant's residence address "is material" in any way. It is clear

(including by Plaintiffs' failure to demonstrate its relevancy) that such information has no place in the FAC and is intended only to harass Moving Defendant.

III. CONCLUSION

For the reasons stated herein, Plaintiffs' late-filed Opposition should not be considered. If it is considered, it does not support Plaintiff's position as demonstrated above. Moving Defendant's Motion to strike should be granted.

DATED: August 15, 2011

SCHUMANN, RALLO & ROSENBERG, LLP

By: /s/ - Jeffrev P. Cunningham

Kim Schumann, Esq.
Peter Cook Esq.
Attorneys for Defendant,
YOSEF TAITZ

DECLARATION OF JEFFREY P. CUNNINGHAM, ESQ.

I, JEFFREY P. CUNNINGHAM, declare and state as follows:

1. I am an attorney and a Senior Associate of the law firm Schumann, Rallo & Rosenberg, LLP, counsel for Defendant, YOSEF TAITZ. I make this declaration based on my personal knowledge of the facts stated herein. I gained my knowledge of those facts by virtue of my participation in the events described herein, my preparation or review of the documents described herein, or some combination of the foregoing as identified herein. If called to testify to the facts stated herein, I could and would do so competently and truthfully.

2. Attached hereto as “**Exhibit A**” and incorporated herein by this reference as though fully set forth is a true and correct copy of the Notice of electronic filing regarding all Plaintiffs’ Opposition (consisting of twenty-three pages) to Mr. Taitz’s Motion to strike portions of Plaintiffs’ First Amended Complaint. As reflected in that Notice, Plaintiffs filed such documents at 6:05 p.m. (PDT) on Saturday, August 13, 2011. Thus, the Opposition was filed and served five days too late. (Local Rule 7-9.)

3. I first saw Plaintiffs’ Opposition and the related “**Exhibit A**” Notice on the morning of Monday, August 15, 2011 - the same day that Mr. Taitz’s Reply is due to be filed and served. (Local Rule 7-10.)

I hereby declare under penalty of perjury under the laws of the State of California and of the United States of America that the above is true and correct.

Dated this 15th day of August, 2011, in Costa Mesa, California.

/s/ - Jeffrey P. Cunningham

Jeffrey P. Cunningham, Esq.